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August 7, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: January 5, 2007

Case Number: TSO-0458

This decision concerns the eligibility of XXXXXXXXXXXX ("the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's access authorization should be restored.

I. BACKGROUND

The Individual has been employed at a DOE facility in a position that requires him to hold an access authorization. The Individual had several prior alcohol-related incidents, including arrests for Driving Under the Influence (DUI) in 1970 and 1991. DOE Ex. 7. In October 2005, the Individual was again arrested for DUI.¹ *Id.* The Individual was the subject of a Personnel Security Interview (PSI) in December 2005. During the PSI, the Individual discussed his October 2005 DUI arrest and his alcohol use in general. *Id.*

The Individual was referred to a DOE consultant-psychiatrist ("Psychiatrist No. 1") for an evaluation. DOE Ex. 6. Psychiatrist No. 1 interviewed the Individual in April 2006. DOE Ex. 8. Following his evaluation of the Individual's file and the interview, Psychiatrist No. 1 issued a report in April 2006 and a supplemental report in May 2006. *Id.*

In his April 2006 report, Psychiatrist No. 1 discussed his evaluation of the Individual. He concluded the following,

[The Individual] present[ed] with a history of apparent heavy alcohol use in his late teen, early adulthood years. He has since been arrested for DUI on two occasions in 1991 and then in 2005. While the circumstances of [the 2005] arrest are somewhat sketchy, by his report it was thrown out of court...While this arrest does meet the criteria for alcohol abuse, it was thrown out of court. At this time he continues to drink, by his report once or twice per week...however, he has

¹ The Individual self-reported the 2005 DUI arrest to the DOE.

modified his behavior to a more acceptable level. This would show evidence currently of rehabilitation and reformation in that his current use is no[t] maladaptive. Presently, I see no evidence of any illness or mental condition which may affect [h]is judgment or reliability.

DOE Ex. 8. In May 2006, Psychiatrist No. 1 wrote a letter to the Local Security Office (LSO) expanding on his April 2006 report. He stated, “as noted, [the Individual] has reported multiple arrests for DUI, the last being in 2005 with a 14 year span in between. By his report, he has modified his behavior keeping the periods of time that he does drink to a minimum and having his wife pick him up when he does drink. This modification of behavior would account for reformation.” *Id.*

In November 2006, the LSO notified the Individual that his various alcohol-related problems and the Psychiatrist’s conclusion that the Individual’s 2005 DUI arrest was indicative of Alcohol Abuse created security concerns under 10 C.F.R. § 710.8(j). (Criterion J). Notification Letter, November 24, 2006. Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. *See* Individual’s Letter, December 8, 2006. The Director of the Office of Hearings and Appeals (OHA) appointed me to serve as the Hearing Officer.

In response to an inquiry from OHA regarding Psychiatrist No. 1’s determination that he saw “no evidence of any illness or mental condition which may affect [the Individual’s] judgment or reliability,” the LSO forwarded the Individual’s case file, along with the two reports issued by Psychiatrist No. 1, to a second DOE consultant-psychiatrist (“Psychiatrist No. 2”) for review. Psychiatrist No. 2 informed the LSO that, in his opinion, Psychiatrist No. 1’s determination was “not supported by the evidence presented or even by the body of his report.” Letter from Psychiatrist No. 2 to LSO, February 21, 2007. Subsequently, the LSO stated that the security concern was that the Individual was a user of alcohol habitually to excess.

A hearing was held in this matter. The DOE counsel submitted documents into the record. At the hearing, the Individual presented his own testimony as well as the testimony of his wife, his brother-in-law, his supervisor, a co-worker, and a friend to support his position that he does not have an alcohol problem. The DOE counsel presented the testimony of one witness: Psychiatrist No. 2.

II. THE HEARING

A. The Individual

The Individual discussed his history of alcohol use. He stated that he first began drinking when he was about 16 years old, having a “couple of beers once in a while.” Tr. at 74. He stated that he had four alcohol-related arrests between 1968 and 1975, “some of them were just illegal possession and so forth. One was a DUI and drinking underage.” Transcript (“Tr.”) at 72. The Individual stated that he had a DUI charge in 1973 which went to trial and resulted in a “not guilty” verdict. *Id.* The Individual stated that he pled guilty to, and paid a fine for, his 1991 DUI charge. *Id.* According to the Individual, his 2005 DUI arrest was expunged from his record following a hearing in “January or February [of 2006].” Tr. at 74.

The Individual stated that he stopped drinking alcohol when he received a copy of Psychiatrist No. 2's February 2007 letter about one month prior to the hearing. He stated, "I'm not a person that drinks everyday or every other day...it's no trouble for me to stop drinking." Tr. at 75. He stated that up until that time, he would drink alcohol "about once a week." Tr. at 80. The Individual stated that he does not drink alcohol at home. Tr. at 106. He stated that he typically stops at a particular restaurant (hereinafter "the Restaurant") after work and spends some time with friends or colleagues who also frequent the Restaurant. Tr. at 77. He stated that some weeks he doesn't stop at the Restaurant at all; other weeks, such as when he is on vacation, he might go to the Restaurant two or three times. Tr. at 77-78. He stated that he might consume two to four ten-ounce beers. Tr. at 78, 80-81. He stated that he has had more beers on occasion, but only when he knew his wife was driving. Tr. at 78. He stated that he has decreased his alcohol consumption since 2005. According to the Individual, from 2005 to February 2007, he might stop at the Restaurant "about once a week" and typically drink two or three ten-ounce beers. Tr. at 80-81, 103-104, 106. The Individual stated that he never went to work intoxicated or ill or missed any days of work due to alcohol use. Tr. at 106-107. The Individual stated that it had been a "long, long time" since he had last been intoxicated. Tr. at 91. He stated that he did not recall being intoxicated in over a year. *Id.*

The Individual stated that on the night of the 2005 DUI, he consumed four beers over approximately two and a half to three hours. Tr. at 81. He stated that he was meeting some friends who told him they would be at one of three different locations that night. According to the Individual, he went to the three locations looking for his friends, but could not find them. At the first location, the Restaurant, the Individual consumed three ten-ounce beers over an approximately two-hour period. Then he went to a second location to look for his friends and had one 12-ounce beer over about a one-half hour to one hour period. Then he went to a third location but did not drink any alcohol there. Tr. at 81-84.

The Individual stated that he was driving home late that night on a road that had had some problems with vandalism. He stated that he saw a car that he believed might have been connected to the vandalism and he turned around to follow the car to try to get its license plate number. According to the Individual, he later learned that the driver of that car had been patrolling the area and reported the Individual as a suspicious vehicle to a friend on the police force that was nearby. Tr. at 85-87. The police officer drove to the area, saw the Individual, and pulled him over. The police officer told the Individual that someone patrolling the area had reported that the Individual's vehicle looked suspicious and he asked the Individual whether he had been drinking alcohol that night. Tr. at 88. The Individual told the officer that he had consumed alcohol several hours earlier and the officer gave him a field sobriety test. The Individual stated, "[the officer] had me standing on one foot and this and that. I can't do that very well. I've got problems with my neck, but I didn't really know that at the time...I didn't fall over or anything, but I didn't do very good at it."² Tr. at 89. The Individual stated that he was then taken to the police station where he was asked to take a Breathalyzer test. The Individual requested that he be allowed to have an attorney present during the test, but was

² The Individual stated that within the past year he was diagnosed with "three bad discs" and problems with the nerves in his neck. Tr. at 89.

unable to contact an attorney at such a late hour. As a result, he “was locked up at that time” and no breath- or blood-alcohol test was administered. Tr. at 90.

The Individual stated that the 2005 DUI charge was dismissed and the arrest was expunged from his record.³ Tr. at 100. He stated, “they expunged it because there was no validity of why I was even stopped. It was actually thought that I might be helping someone by getting a license plate number, and they expunged it. I mean, the policeman...said there wasn’t any weaving or any bad driving. I was just stopped because of [the person patrolling the area calling his friend].” Tr. at 100-101. The Individual maintained that he was not intoxicated at the time of the arrest. Tr. at 101.

The Individual stated that he was examined by Psychiatrist No. 1 in April 2006. *Id.* He stated that Psychiatrist No. 1’s final evaluation “showed evidence of rehabilitation, reformation, and the current use of alcohol was not [maladaptive].” *Id.* The Individual stated that when he received a copy of the evaluation, he believed that Psychiatrist No. 1’s final evaluation “would be the end of it.” Tr. at 102.

B. The Individual’s Wife

The Individual’s wife stated that she and the Individual had been married for 35 years. Tr. at 11. She stated that she had seen the Individual drive after consuming alcohol, but that she had never seen him “drive drunk.” Tr. at 13. According to the Individual’s wife, the Individual drinks occasionally in social settings but does not drink at home. Tr. at 17. She stated that she has never been concerned about the Individual’s alcohol consumption because “he doesn’t do it to the extreme.” Tr. at 18. She added that neither of their two children had ever voiced a concern about the Individual’s alcohol consumption. *Id.* The Individual’s wife stated that on occasion the Individual will go to the Restaurant after work and she picks him up there on her way home from the gym because it is convenient. Tr. at 19. Regarding the Individual’s 2005 DUI, the Individual’s wife stated, “I know [the Individual] wasn’t drunk because I can tell. I’ve lived with him for 35 years. I can tell it in his voice if he’s had too much...I can just tell, and he wasn’t [drunk].” Tr. at 23. She added that the 2005 DUI charge was dismissed because “there was no reason for it.” Tr. at 24. She concluded by stating that the Individual takes security very seriously and that he never speaks about his work. Tr. at 22.

C. The Individual’s Brother-In-Law

The Individual’s brother-in-law stated that he has known the Individual for 35 years. Tr. at 27. He stated that he sees the Individual about once a month and has seen the Individual at various family gatherings where alcohol was served. Tr. at 33, 28. The Individual’s brother-in-law stated that the Individual’s alcohol consumption was “never to excess.” Tr. at 32. He stated that in the time he has known the Individual, he has never seen the Individual intoxicated. Tr. at 28. He added, “I’ve never seen him lose control.” Tr. at 31. The Individual’s brother-in-law described the Individual as a reliable person. Tr. at 29.

³ There is no evidence in the record which corroborates or contradicts the Individual’s account of the events leading to the 2005 DUI arrest or the disposition of the resulting charges.

D. The Individual's Supervisor

The Individual's supervisor stated that he has been the Individual's supervisor for five to six years. Tr. at 36. He stated that he never had any concerns regarding the Individual's judgment or reliability. *Id.* The supervisor stated that he had never seen the Individual intoxicated at work and he was unaware of whether the Individual had any alcohol-related problems. Tr. at 36, 39. The supervisor stated that although he and the Individual do not socialize outside of work, he has seen the Individual leaving the Restaurant and the Individual did not appear to be impaired on that occasion. Tr. at 38, 37.

E. The Individual's Co-Worker

The Individual's co-worker stated that he has known the Individual for about 19 years. Tr. at 41. He stated that he has gone hunting with the Individual and attended other functions with him. Tr. at 43. The co-worker stated that he had recently attended a function with the Individual and although alcohol was present, the Individual did not consume any alcohol. Tr. at 45. The co-worker stated that he had no concerns regarding the Individual's alcohol consumption, stating, "the 19 years that I've known him, I've never known him to be dependent on anything." *Id.* The co-worker added, "I'm a father of three kids. [The Individual] has been around all my kids. I mean, he's just a good father figure, a great person." Tr. at 43.

F. The Individual's Friend

The Individual's friend stated that he has known the Individual for about 29 years. Tr. at 52. He stated that he has seen the Individual at the Restaurant after work and has never seen him intoxicated there. Tr. at 53-54. The Individual's friend stated, "I don't think [the Individual] abuses alcohol." Tr. at 61. Regarding what he has seen the Individual drink at the Restaurant, the friend stated,

He sips on beer. He drinks one or two beers, three beers, and he sips on them. He eats pizza. He doesn't get drunk. I mean, just – he likes to talk. He's knowledgeable. People talk sports. They talk politics. He's just – you know, he's a good person...I've seen shift superintendents at [the Restaurant]. I've seen building supervisors at [the Restaurant]. I've seen professional baseball scouts at [the Restaurant] You see lawyers, doctors at [the Restaurant]. I mean, it's not – you run into all types of people, and you have good conversation. I mean, [the Individual] doesn't go there to get drunk, and he doesn't get drunk.

Tr. at 61-62. The friend stated that he and the Individual socialize together, "just friends getting together." Tr. at 63. He stated that sometimes alcohol is present, however the last few times they went out, he drank beer and the Individual drank tea. *Id.* He stated that prior to that, when they went out, the Individual may have had "three [beers] at the most" over "two to three hours." Tr. at 64. The Individual's friend gave his definition of intoxication. He stated, "if someone's intoxicated, I think their speech is slurred, [they] have trouble walking, had too much to drink." *Id.* He added that he has never seen the Individual intoxicated. *Id.* The Individual's friend

stated that the Individual had been drinking less and now does not drink at all. Tr. at 70. He concluded, "I've known [the Individual] a long time and...I don't think he abuses alcohol." Tr. at 67.

G. Psychiatrist No. 2

Psychiatrist No. 2 stated that because he did not personally interview and evaluate the Individual, he made no judgment regarding Psychiatrist No. 1's assessment of the Individual. Rather, Psychiatrist No. 2 stated that he believed Psychiatrist No. 1's letter was "internally contradictory." Tr. at 112-113. According to Psychiatrist No. 2, Psychiatrist No. 1's letter stated that the Individual abused alcohol, but that since his wife picked him up at the Restaurant, he now had good judgment and was reformed, implying that DOE's concern was with DUIs. Tr. at 113-114. Psychiatrist No. 2 stated that he believes that DOE's concern is not solely with an individual's DUIs, but is related to the person's overall drinking habits. Tr. at 114. Speaking in general terms, and not about the Individual in particular, Psychiatrist No. 2 stated that if an individual was diagnosed with alcohol abuse, simply having someone else drive him home would not indicate that the individual no longer suffered from alcohol abuse. *Id.*

Regarding how much alcohol would be considered "excessive," Psychiatrist No. 2 stated that it would depend "solely on the frequency of the drinks. The question has to be 'how much alcohol does a person consume over what period of time?'" Tr. at 115. He added, "generally, the standard for that is two drinks per hour is okay, as far as driving is concerned. Over two drinks per hour is not good at all; that is, the chances of intoxication are too great." *Id.* Psychiatrist No. 2 stated that the frequency of the alcohol consumption is "not really an issue unless the drinking itself is excessive." Tr. at 118. He added that "a typical male in his 50s habitually [drinking] three to four beers twice a week" is not "per se" excessive. Tr. at 119-120.

III. STANDARD OF REVIEW

The regulations governing the Individual's eligibility for an access authorization, also referred to as a security clearance, are set forth in 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security clearance determinations should err, if they must, on the side of denials").

Under Part 710, the DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. Once a security concern is raised, the individual has the burden to bring forward sufficient evidence to resolve the concern.

In considering whether an individual has resolved a security concern, the Hearing Officer considers various factors, including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. *Id.* § 710.7(c). The decision concerning eligibility is a comprehensive, common-sense judgment based on a consideration of all relevant information, favorable and unfavorable. *Id.* § 710.7(a). In order to reach a favorable decision, the Hearing Officer must find that “the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest.” *Id.* § 710.27(a).

IV. ANALYSIS

A. The Security Concerns

The derogatory information concerning Criterion J centers on the Individual’s alcohol use. Criterion J concerns conduct indicating that the Individual has “been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.” 10 C.F.R. § 710.8(j). Given the Individual’s October 2005 DUI arrest, the LSO had sufficient grounds to invoke Criterion J. Thus, the only issue to be resolved is whether these security concerns have been adequately mitigated.

B. Mitigating Factors

The DOE regulations do not specify what constitutes use of alcohol “habitually to excess.” Guideline G of the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information addresses the issue of alcohol consumption. *See* Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House (“the Adjudicative Guidelines”). Guideline G cites as a security concern “the habitual or binge consumption of alcohol to the point of impaired judgment.” Guideline G, ¶ 22(c). Accordingly, use of alcohol “to the point of impaired judgment” appears to be the DOE’s standard of use of alcohol “to excess.”⁴ Guideline G also sets forth examples of conditions that may serve to mitigate security concerns involving alcohol. Guideline G, ¶ 23. According to Guideline G, such conditions include the passage of sufficient time so as to indicate that the problematic alcohol use “is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment” and a pattern of responsible use. *Id.*

The Individual stated that prior to February 2007 he consumed alcohol once or twice a week, typically drinking two to three beers over about two hours. He stated that he did not drink alcohol at home and that he did not drink to the point of intoxication. The Individual also

⁴ Psychiatrist No. 2’s definition of “to excess” is consistent with the Guidelines and the related security concerns. Psychiatrist No. 2 phrased his definition of “excessive” alcohol use in terms of “the chances for intoxication.” *See* Tr. at 115. He also indicated that the frequency of the alcohol consumption was not an issue unless the consumption itself was excessive.

brought forth the testimony of several witnesses, all of whom have known the Individual for several years and are familiar with his lifestyle, to corroborate his assertion that he did not drink habitually to excess. I believe the witnesses testified honestly and candidly about their knowledge of the Individual's alcohol consumption. The Individual's wife stated that she did not have any concerns with the Individual's alcohol consumption because he did not "do it to the extreme." She also corroborated the Individual's testimony that he did not consume alcohol at home and that he has stopped drinking alcohol altogether. The Individual's brother-in-law, who has known the Individual for 35 years and has seen him regularly at family gatherings where alcohol was present, stated that he never saw the Individual impaired. The Individual's friend, who often socializes with the Individual, corroborated the Individual's testimony regarding how often the Individual drinks and how much alcohol he consumes. He also stated that in the 29 years he has known the Individual, he has never seen him intoxicated. In addition, the Individual's co-worker, who has known the Individual for approximately 19 years, stated that he had seen the Individual not drink alcohol at gatherings where it was served and that he had no concerns regarding the Individual's alcohol use. Finally, the Individual's supervisor stated that he was not aware of any alcohol-related problems the Individual had and stated that he had seen the Individual leaving the Restaurant and the Individual was not impaired. Psychiatrist No. 2's refusal to comment specifically on the Individual's alcohol use, even after having reviewed the Individual's case file and listened to all of the hearing testimony, was unhelpful and shed little light on the issue of the Individual's alcohol consumption. However, speaking in general terms, he did opine that, typically, consuming two drinks per hour would be "okay." He also indicated that it would not be problematic, per se, for a typical male in his 50s to consume three or four beers twice a week.

I find that the Individual's alcohol consumption was "habitual" in that he typically drank alcohol once or twice per week. I also find that prior to 2005 the Individual was a user of alcohol to the point of impaired judgment and, therefore, to excess. The Individual has had three DUI arrests. Such a history of alcohol-related legal problems, regardless of the disposition of the charges in each of those cases, is indicative of excessive use of alcohol. Both the Individual and his wife report that the 2005 arrest was expunged from the Individual's record, purportedly because there was no basis for the arrest. However, there is insufficient evidence in the record to corroborate this assertion. There is also insufficient evidence to corroborate the Individual's account of the events leading to the 2005 DUI arrest, including his assertion that he was not intoxicated at that time. While I believe the Individual's witnesses testified honestly about their recollection of the Individual's alcohol consumption, I do not believe that those witnesses can accurately state whether the Individual was impaired after consuming alcohol, particularly if the witnesses themselves were also drinking when they observed the Individual.

Nevertheless, I also find that since 2005 the Individual has not consumed alcohol to the point of impairment. There is strong evidence in the record that the Individual took the 2005 DUI arrest seriously and decreased his alcohol consumption, ultimately stopping his alcohol use altogether. Based on the testimony of the Individual and his witnesses, since 2005 the Individual limited his alcohol consumption to two or three drinks over the course of several hours. According to the evidence in the record, in the past several years, the Individual typically went to the Restaurant, stayed for an extended period of time, and drank two to three ten-ounce beers, often with food. This behavior indicates a pattern of responsible use and good judgment. The Individual stopped

drinking alcohol altogether in February 2007. Based on this information, I find that the Individual has not been a user of alcohol to excess since 2005.

After assessing the record in this case, including the character and demeanor of the Individual and the other witnesses at the hearing, I conclude that the Individual was a user of alcohol habitually to excess until 2005. However, since 2005, the Individual curtailed his alcohol use, ultimately ceasing his alcohol consumption altogether, and has had no further alcohol-related problems. As a result, I find that the Individual has not been a user of alcohol habitually to excess since 2005, an extended period of time during which the Individual has demonstrated a pattern of responsible use. Accordingly, I find that the security concerns set forth in the Notification Letter under Criterion J regarding the Individual's alcohol use have been adequately resolved. Therefore, I believe that the Individual's access authorization should be restored.

V. CONCLUSION

Upon consideration of the record in this case, I find that there was evidence that raised a doubt regarding the Individual's eligibility for a security clearance under Criterion J. I also find sufficient evidence in the record to fully resolve the concerns raised under Criterion J. Therefore, I conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, the Individual's access authorization should be restored.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Diane DeMoura
Hearing Officer
Office of Hearings and Appeals

Date: August 7, 2007